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### Montana's Unique Writ of Supervisory Control

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# MONTANA'S UNIQUE WRIT OF SUPERVISORY CONTROL

BY LARRY HOWELL, UNIVERSITY OF MONTANA SCHOOL OF LAW

The Montana Supreme Court's unique writ of supervisory control has a long and storied history, dating back to its creation during the infamous War of the Copper Kings in Butte.<sup>1</sup> For much of that history, the writ has also been the subject of considerable dissension and confusion among both members of the court and lawyers practicing before it. Recently, however, the Supreme Court has taken steps to clarify the law of supervisory control. Rule 14(3) of the new Montana Rules of Appellate Procedure, which went into effect in October 2007, expressly states for the first time the circumstances under which the writ will issue. This new rule effectively codifies the original criteria set forth 108 years ago in *State ex rel. Whiteside v. First Judicial District Court*.<sup>2</sup> Additionally, comments the court attached to the proposed rule (but that do not accompany the adopted rule) provide additional guidance.<sup>3</sup>

Rule 14 also expressly states that the final determination of whether to exercise supervisory control is a case-by-case analysis, just as it always has been. But lawyers considering filing a petition for supervisory control would benefit from understanding how the new rule fits with the previous 100-plus years of often inconsistent Montana case law. Even though the court has recently issued very few writs, the language of the new rule, coupled with the comment explaining it and an understanding of the writ's history, provide an opportunity for attorneys to argue, in meritorious cases, that the writ should be readily available to spare the parties needless litigation.

The writ of supervisory control has been controversial since the

Montana Supreme Court announced its creation on Christmas Eve 1900. Chief Justice Theodore Brantly, considered by his peers to be "the John Marshall of Montana,"<sup>4</sup> literally invented this unique remedy from whole cloth during the middle of the War of the Copper Kings, primarily to allow the court review otherwise non-appealable interlocutory rulings by a notoriously corrupt Butte district judge.<sup>5</sup> Judge William Clancy was presiding over arguably the most significant litigation in America – the myriad legal battles to control the vast ore deposits under the "richest hill on earth" at a time when the spread of electricity and telephones had caused the demand for copper to explode. Controlled by the most litigious of the copper kings, F. Augustus Heinze, Clancy's biased pretrial rulings, such as appointing a Heinze crony receiver for a competing mine, were causing financial havoc among Heinze's competitors in the mining industry, including Marcus Daly's Anaconda Copper-Mining Company.<sup>6</sup> In response, Brantly created the writ to allow the Supreme Court "to control the course of litigation in the inferior courts,"<sup>7</sup> thereby circumventing the black-letter "final judgment rule" that generally prevents appellate review of interlocutory rulings.<sup>8</sup>

Within a few years, corporate consolidation had ended the battles in the mining industry, Clancy had been voted out of office, and much of Montana's pervasive corruption had disappeared. The writ of supervisory control, however, lived on. Deprived of the important reason for its creation, the writ soon became a source of disagreement among justices, which naturally led to confusion

among lawyers seeking the writ. The court struggled throughout the last century and into the early years of this one in applying consistent criteria for issuing the writ.<sup>9</sup> In fact, within a few years of the writ's creation, an observable pattern developed that would repeat itself throughout the next hundred years. When the court would grant a few petitions for supervisory control, it would find itself inundated by many more. Then, the court would ratchet down the requirements for issuing the writ, which would reduce the influx, at least until a new cycle began.<sup>10</sup>

The court's first attempt to tighten the requirements came just five years after the writ's creation. In *Whiteside*, the court set out a three-part test, holding that supervisory control was appropriate when a trial court had made a mistake of law, resulting in a "gross injustice," for which there was no adequate remedy by appeal.<sup>11</sup> However, after receiving an increasing stream of writ petitions due to the numerous writs issued against Clancy, the court announced in 1905 that the writ "is one to be seldom issued, and then only when . . . the acts of the court complained of as threatened will be arbitrary, unlawful, and so far unjust as to be tyrannical."<sup>12</sup>

That new requirement of judicial tyranny succeeded in reducing the number of writs issued for a decade. But then the court virtually invited petitions for supervisory control in 1915 by issuing a writ for the first time merely to prevent needless litigation. In *State ex rel. Mannix v. District Court*, the court was confronted by a probate case that had dragged on for years before several judges and issued a writ simply to bring the case to an end.<sup>13</sup> That result seemingly

contradicted the statement in *Whiteside* that the power was intended "to keep the courts themselves 'within bounds'" and that any effect "on the rights of suitors in particular cases . . . is incidental purely."<sup>14</sup> *Mannix* would have a profound impact in the future because, for the first time, it focused on the impact the writ would have on the litigation, rather than on the nature of the trial judge's conduct.

Two cases involving change of venue motions capture the vacillation of the court during much of the twentieth century. In *State ex rel. Interstate Lumber Company v. District Court*, a 1918 opinion by Chief Justice Brantly, the court issued a writ ordering the trial judge to change venue. After noting that there was no immediate appeal from a ruling on a venue motion, the court concluded that simply "suffering the additional expense and inconvenience" of a trial in the wrong county was sufficient injury to merit supervisory control.<sup>15</sup>

But six years later – and more importantly, two years after Brantly's death,<sup>16</sup> – the court revisited that question in *State ex rel. Bonners Ferry Lumber Company v. District Court*.<sup>17</sup> Using surprisingly harsh language, the court called Brantly's *Interstate Lumber* opinion "so manifestly erroneous that it ought not to stand of record unchallenged to mislead litigants and their counsel."<sup>18</sup> The court then announced a return to the standard of judicial tyranny, stating that any lesser standard would open the floodgates "with the result that the appellate jurisdiction would be destroyed for all practical purposes."<sup>19</sup>

The court failed to stick to the judicial tyranny standard and instead repeatedly issued supervisory writs over the years simply to prevent needless litigation. *State ex rel. Crowley v. District Court*,<sup>20</sup> decided less than two decades later, may illustrate the most liberal use of supervisory control. Not only did the opinion fail to apply the judicial tyranny standard, it

failed to even require a showing of gross injustice. Instead, the court held it was "well settled that the supervisory power of this court was designed to control summarily the course of litigation in the trial courts *where for any reason relief by appeal would be inadequate*."<sup>21</sup> In support of that broad language, the court cited a change in philosophy about the very purpose of the courts, noting that its holding was in keeping with "the modern theory that the courts are for the benefit of the litigants and the public interest."<sup>22</sup>

The court's cyclical struggles peaked in 1957 when, at the urging of the chief justice, it came within one vote of abolishing the writ of supervisory control.<sup>23</sup> Although he was outvoted in the case, Chief Justice Hugh R. Adair's dissenting opinion derided the writ as "purely the creature of the inventive genius of the court without being prescribed or authorized by either the Codes, the statutes or any other written law of

to Page 21

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this state.”<sup>24</sup> He was joined on the five-member court by another justice, who described the writ as “simply this court’s created device and fiction.”<sup>25</sup>

Fifteen years later, at the 1972 Constitutional Convention, critics in the larger legal community picked up where critics on the court had left off. The Convention’s Judiciary Committee adopted a majority proposal that criticized the writ’s creation as well as its use as a substitute for appeals. As a result, the majority proposal entirely deleted from the new Constitution the court’s power to exercise supervisory control over lower courts.<sup>26</sup> That proposal led delegates to engage in a spirited floor debate, which concluded with a strongly populist defense of the writ by Jerome Cate, a Billings trial lawyer. Cate told his fellow delegates that corporations and other monied interests opposed the writ because it hampered their ability to drag out litigation when judges made erroneous pretrial rulings in their favor, which Cate implied happened with some frequency. “But for the people, the little people, they need the writ of supervisory control,” Cate continued, “because it’s a way to keep the judges honest and it’s a way to avoid having to go all the way through a trial and all the expenses of an appeal in order

to get an issue decided.”<sup>27</sup> Shortly after Cate finished, delegates rejected the proposal to abolish the court’s supervisory control power.<sup>28</sup>

As a result, convention delegates not only eliminated any debate about the writ’s legitimacy, they also effectively ratified its broad use to prevent needless litigation. Yet in the dozens of supervisory control decisions issued over the three and one-half decades since the Constitution was adopted, the court has never discussed the significance of the delegates’ debate and subsequent endorsement of the writ.

Perhaps this explains why the court soon resumed its inconsistent application of supervisory control. For example, a few years after the new Constitution was adopted, the plaintiff in *Kinion v. Design Systems, Inc.* sought supervisory control to review an interlocutory ruling vacating a default judgment and forcing the parties to proceed to what was arguably a needless trial.<sup>29</sup> The court summarily rejected the petition, holding that the very idea of using supervisory control to review such an unappealable ruling – something it had done scores of times – was beyond the pale: “To permit review of such an order prior to final judgment through the device of supervisory

control or other extraordinary writ is to accomplish indirectly that which cannot be done directly.”<sup>30</sup> However, a few years later, the court granted supervisory control to reverse a lower court’s ruling denying a motion to dismiss,<sup>31</sup> which of course is also an interlocutory ruling. Despite that similarity to *Kinion*, the court said it would exercise supervisory control “to protect [the defendant] from participating in needless litigation, a purpose for which a writ of supervisory control is intended.”<sup>32</sup>

In the last few years, the court has just completed another decade-long period in which it first tended to grant supervisory control liberally, only to subsequently restrict its use to very few cases. This latest cycle began in the mid-1990s with the court’s decisions in *Plumb v. Fourth Judicial District Court*<sup>33</sup> and *Preston v. Eighteenth Judicial District Court*.<sup>34</sup> Both cases contained lengthy discussions of the history of supervisory control and both cases, as the court noted in *Preston*, expressly sanctioned the use of supervisory control to prevent unnecessary litigation.<sup>35</sup>

As in the 1950s and 1960s, that liberal use of the writ eventually drew the ire of the court’s chief justice. In *Truman v. Eleventh Judicial District*, for instance, the court

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granted supervisory control to reverse a trial court's discretionary admission of a key piece of evidence: "[T]he admission of improper evidence or improper jury instructions will render the results unreliable and the cost to Truman in both time and finances will be substantially increased. Consequently, we conclude that an appeal is an inadequate remedy and justice requires this court to exercise supervisory control . . . ."<sup>36</sup> That led Chief Justice Karla Gray to argue in dissent that the court was:

drifting into accepting supervisory control over nearly any kind of pretrial ruling, whether based on a purely legal conclusion or a discretionary act, where the ultimate result could be a reversal on appeal and the necessity of further proceedings thereafter. Evidentiary rulings, rulings on motions to dismiss or summary judgment, and speedy trial rulings are not "extraordinary circumstances" which create significant injustice for which an appeal is an inadequate remedy.<sup>37</sup>


Subsequently, in *Lane v. Fourth Judicial District Court*, the court granted supervisory control to review – and then affirm – the district court's denial of a motion for summary judgment,<sup>38</sup> perhaps the least appealable interlocutory ruling of all. *Lane* is perhaps the oddest

supervisory control case since the writ was created because after the court granted supervisory control, it concluded that the lower court had not even committed a mistake of law, much less one causing a gross injustice for which appeal was an inadequate remedy. That led to another lengthy dissent by Chief Justice Gray in which she echoed previous critics on the court from decades before:

At the bottom line, the court is using supervisory control jurisdiction to transform the traditional structures and roles of the trial courts and this court. A "gross injustice" apparently now means only an erroneous – or potentially erroneous – ruling or an alleged pretrial abuse of discretion which, if not corrected by this court's intervention, will permit the proceedings in the trial court to proceed in their normal course with their associated delays and expenses. In the future, will any rational attorney refrain from petitioning for supervisory control on any nonappealable ruling at any stage in trial court proceedings? On what grounds will the court ever find reason to deny supervisory control? And how in the world does such an approach comport with either the trial courts' general authority to control the proceedings before them or our primary role as an appellate court?<sup>39</sup>

Following the odd result in *Lane*, Gray's criticisms seem to have had some impact. As Gray noted in her *Lane* dissent, in the six years before its 1996 decision in *Plumb*, the court had granted supervisory control in 35 cases, or about six per year, while in the six years after *Plumb* the court granted supervisory control 60 times,<sup>40</sup> an average of ten per year. More recent statistics from the court show the trend has reversed dramatically, and the court has recently substantially reduced the number of supervisory writs issued. In 2004, the court issued the writ seven times,<sup>41</sup> which was close to the average before *Plumb*. In 2005, the court issued only three supervisory writs.<sup>42</sup> In 2006, it only issued one writ of supervisory control.<sup>43</sup> That number increased to five in 2007,<sup>44</sup> but it was still below the average before *Plumb* and *Preston*.

Understanding the court's century-long struggle with supervisory control provides context for the recent adoption of Rule 14 of the Montana Rules of Appellate Procedure. Rule 14 for the first time codified the *Whiteside* test for supervisory control, as well as clarified the other uses of the writ.<sup>45</sup> Before these new rules were adopted, Rule 17 of the former Montana Rules of Appellate Procedure lumped the court's



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supervisory control jurisdiction in with its original jurisdiction to issue the traditional common law writs, such as *habeas* and *mandamus*, but provided no specific test for exercising supervisory control. Lawyers seeking the writ were forced to sort through the inconsistent and confusing cases in hopes of finding a favorable precedent for their facts.

Rule 14(3) now expressly sets forth the criteria for issuing writs of supervisory control:

**(3) Supervisory control.** The Supreme Court has supervisory control over all other courts and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. Supervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:

- a) The other court is proceeding under a mistake of law and is causing a gross injustice;
- b) Constitutional issues of state-wide importance are involved;
- c) The other court has granted or denied a motion for substitution of a judge in a criminal case.

In comments to the proposed rule, the court omits any mention of *Whiteside* and instead states that the rule is intended to codify the court's decision in *Plumb*, as clarified by *Preston*.<sup>46</sup> However, as the wording makes clear, the first subpart of subsection (3) actually codifies Chief Justice Brantly's landmark opinion creating the writ. In *Whiteside*, Brantly wrote that the writ was to be used

only in "exigent" cases in which lower courts "by a mistake of law . . . are doing a gross injustice, and there is no appeal, or the remedy by appeal is inadequate."<sup>47</sup> Rule 14(3)(a) adopts each of those criteria, albeit in slightly different words.

Viewed in conjunction with the confusing history of supervisory control, the court's clarification of the law through the adoption of Rule 14(3) provides practitioners with some guidance on how to approach petitions for writs of supervisory control. First, applicants should recognize that cases applying criteria or standards other than the original three-part gross injustice test – such as cases requiring "judicial tyranny" or those with little analysis of the severity or exigency of the legal error – are of little precedential value. Not only does the new rule specifically codify the gross injustice test, but the court's comment to the proposed rule appears to disavow any other basis for issuing the writ. The comment lists various cases in which the court had "cited other reasons for granting supervisory control, such as judicial economy, clarification of the law, and irreparable harm."<sup>48</sup> The clear implication is that those reasons will no longer be deemed sufficient. Therefore, citing cases containing those reasons in a petition to the court is unlikely to find a receptive audience.

Second, the fact that the court's comments cite *Plumb* and *Preston* as the key cases on which Rule 14(3) is based suggests that the court has accepted, perhaps once and for all, that preventing unnecessary litigation is a legitimate use of supervisory control, as long the facts of a specific case can meet the "gross injustice" test. *Preston* expressly recognized that *Plumb* "sanction[ed] the exercise of supervisory control in order to prevent a litigant from being placed at a significant disadvantage and to prevent unwarranted expenses and delays . . ."<sup>49</sup> Applicants for

supervisory control should clearly address how the facts in their particular case satisfy that language, given the significance assigned by the comment to *Preston*. Additionally, prior cases in which the court summarily dismissed writ petitions simply because granting the writ would circumvent the appeal process should also be of little precedential value in opposing supervisory control under the new rule.

Third, *Preston* is a case that potential writ applicants should read closely, given the importance the court assigns to it even though it concerned an issue judges generally disdain – a discovery dispute. Because of the discretion trial judges have over discovery, these trial court rulings are generally poor candidates for supervisory control. However, because the trial court denied the plaintiff discoverable design information that went to the heart of a product liability case, the court held all three parts of the gross injustice test were satisfied and issued the writ.<sup>50</sup> The fact that the court's comment to Rule 14(3) specifically cites *Preston* for its "further illumination" of *Plumb* signals that the court now views it as perhaps the key supervisory control case.<sup>51</sup> Only cases with similarly undisputed and compelling facts – i.e., a clear legal error raising obvious doubts about the fairness of proceeding to trial – are likely to merit supervisory control, especially given the court's recent reluctance to issue the writ.

In short, lawyers considering applying for supervisory control should focus less on the ruling they are convinced was erroneous, because an appeal can presumably correct that mistake. Instead, they should focus on whether the impact of the erroneous ruling on the proceedings is so unfair that, as Chief Justice Brantly wrote when he created the writ 108 years ago, "denial of a speedy remedy would be tantamount to a denial of justice."<sup>52</sup>

## ENDNOTES

1. See Larry Howell, "Purely the Creature of the Inventive Genius of the Court": State ex rel. Whiteside and the Creation and Evolution of the Montana Supreme Court's Unique and Controversial Writ of Supervisory Control, 69 Mont. L. Rev. 1 (2008) [hereinafter Supervisory Control] for a much more in-depth discussion of the history and evolution of the writ. Parts of this article were adapted from that much longer article.
2. 63 P. 395 (Mont. 1900).
3. Order at 38-41, In re: the Adoption of the New Rules of Appellate Procedure, No. AF 07-0016 (Jan. 10, 2007).
4. In Memoriam, Theodore Brantly, 64 Mont. vii, xxiii (1922).
5. Supervisory Control, supra n. 1 at 32-49.
6. Id. at 36-38.
7. Whiteside, 63 P. at 400.
8. Supervisory Control, supra n. 1 at 1-76.
9. Id. at 49-54.
10. Id. at 49-50.
11. Whiteside, 63 P. at 400.
12. State ex rel. Heinze v. District Court of Second Judicial Dist., 81 P. 345 (Mont. 1905).
13. State ex rel. Mannix v. District Court of Fourteenth Judicial Dist., 152 P. 753, 753-755 (Mont. 1915).
14. Whiteside, 63 P. at 399 (internal quotations omitted).
15. State ex rel. Interstate Lumber Co. v. District Court, 172 P. 1030, 1033 (Mont. 1918).
16. See In Memoriam, supra, n. 4.
17. 222 P.1050 (Mont. 1924).
18. Id.
19. Id. at 1052.
20. 88 P.2d 23 (Mont. 1939).
21. Id. (emphasis added).
22. Id.
23. State ex rel. Tripp v. Dist. Ct. of Fourth Jud. Dist., 305 P.2d 1101 (Mont. 1957).
24. Id. at 1114-1115 (Adair, C.J., dissenting).
25. Id. at 1117 (Bottomly, J., dissenting).
26. Montana Constitutional Convention, 1971-1972 vol. I, 484 (Mary Warden et al. eds., Mont. Legis. 1979).
27. Id. at vol. III, 1040.
28. Id. at vol. III, 1040-41.
29. 620 P.2d 852, 853 (Mont. 1980), overruled on other grounds, Roberts v. Empire Fire & Marine Ins. Co., 915 P.2d 872, 873 (Mont. 1996).
30. Id. (quotations omitted).
31. First Bank, (N.A.) Western Montana Missoula v. District Court, 737 P.2d 1132, 1134 (Mont. 1987).
32. Id.33. 927 P.2d 1011 (Mont. 1996).
34. 936 P.2d 814 (Mont. 1997).
35. Id. at 817.
36. 68 P.3d 654, 657 (Mont. 2003).
37. Id. at 661 (Gray, C.J., dissenting).
38. 68 P.3d 819, 822 (Mont. 2003).
39. Id. at 826 (Gray, C.J., dissenting).
40. Id. at 822 (Gray, C.J. dissenting).
41. Office of the Clerk of the Supreme Court, Report 7 – Original Proceedings Detail – 2004, [http://www.montanacourts.org/clerk/stats/orig\\_pro04.doc](http://www.montanacourts.org/clerk/stats/orig_pro04.doc) (accessed Feb.25, 2008).
42. Office of the Clerk of the Supreme Court, Report 7 – Original Proceedings Detail – 2005, [http://www.montanacourts.org/clerk/stats/orig\\_pro05.doc](http://www.montanacourts.org/clerk/stats/orig_pro05.doc) (accessed Feb.25, 2008).
43. Office of the Clerk of the Supreme Court, Original Proceedings Report 2006, [http://www.montanacourts.org/clerk/stats/06/orig\\_pro06.pdf](http://www.montanacourts.org/clerk/stats/06/orig_pro06.pdf) (accessed Feb. 25, 2008).
44. Office of the Clerk of the Supreme Court, Original Proceedings Report 2007, [http://courts.mt.gov/clerk/stats/07/orig\\_pro07.pdf](http://courts.mt.gov/clerk/stats/07/orig_pro07.pdf) (accessed Oct. 3, 2008).
45. Mont. R. App. Pro 14(3).
46. Order, supra n. 3 at 38 (explaining "the requirements for supervisory control include the expanded criteria which the Court adopted in Plumb v. Fourth Judicial District Court . . . while retaining the requirements of emergency factors, inadequate remedy of appeal, and purely legal questions (see Preston v. Eighteenth Judicial Dist. Ct. . . . for further illumination of Plumb)" (emphasis deleted; citations omitted)).
47. Whiteside, 63 P. at 400.
48. Order, supra n. 3 at 39.
49. Preston, 936 P.2d at 817.
50. Id. at 818.
51. Order, supra n. 3 at 38.
52. Whiteside, 63 P. at 400. ♦

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